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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 628

Case No. 688: SHKUKANI

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 7 November 1991 and 8 April 1992, Mohammad Issa Shkukani, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 June 1992, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to, inter alia:

"...

[Order]

8. The rescission of the decisions taken against me with the aim of reinstating me in the service of UNRWA when the Tribunal finds out that I am innocent.

9. Compensate me on all the accumulative financial losses which have been entailed since leaving the service."

Whereas the Respondent filed his answer on 22 January 1993;

Whereas, on 28 September 1993, the President of the Tribunal requested the Respondent to produce an answer on the merits, which he did on 12 October 1993;

Whereas, in a series of communications, the last dated 2 November 1993, the Applicant commented on the Respondent's submission;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 20 May 1970, on a temporary indefinite letter of appointment, as an area staff member. He served continuously in that capacity until he separated from service, on 11 November 1989.

At the time of his separation from the Agency, the Applicant held the post of Distribution Team Leader, grade 6, in the Jerusalem Area. As a Distribution Team Leader, the Applicant was responsible for supervising the distribution of food to refugees in his service area, for keeping records and for accounting for all such food supplied, in accordance with UNRWA Regulations.

During the period 16 May to 15 June 1989, the Administration undertook an operational audit of the Supply, Distribution and Warehousing Operations in the West Bank, as a result of a concern that pilferage was taking place there. In a surprise visit to the Jerusalem Area Stores, where the Applicant was the Distribution Team Leader, the auditor discovered irregularities. These included the excessive loading of commodities on trucks for daily distribution, for which the Applicant was unable to provide a plausible explanation.

Subsequently, the auditor made a second surprise visit to the Jerusalem Area Stores and found additional irregularities. Based on the above findings, the auditor recommended that a Board of Inquiry

be established to investigate the distribution operations of the Jerusalem Area Stores.

A Board of Inquiry was appointed on 23 August 1989. The Board interviewed the Applicant on three occasions. It also interviewed 18 witnesses. The Board considered a study undertaken by the Field Relief Department, which established substantial discrepancies between the Applicant's records and the stock actually available. The Board also found that the Applicant's Distribution Team almost uniformly failed to follow Agency rules and guidelines regulating the storage and distribution of commodities. It found evidence of the misappropriation of commodities handled and distributed by the Applicant.

The Board found that the Applicant, and other staff, had been involved in the misappropriation of commodities and had engaged in serious misconduct.

After consideration of the report, the Director of UNRWA Operations, West Bank, informed the Applicant, in a letter dated 11 November 1989, that his appointment would be terminated in the interest of the Agency, pursuant to area staff regulation 9.1, with effect from that date. The letter stated that this action was taken on the basis of the investigation conducted by the Board of Inquiry and its discovery of his "involvement in irregularities in the distribution of commodities".

In a letter dated 13 November 1989, the Applicant requested, pursuant to area staff rule 111.3(1), that the decision to terminate his service be reviewed. In a reply dated 21 November 1989, the Field Director confirmed the Agency's decision to terminate the Applicant's appointment. On 5 December 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 18 May 1990. Its conclusions and recommendation read as follows:

> "(a) It is clear from both the report of the Auditors and the Board of Inquiry that there were irregularities and discrepancies in the distribution and the records thereof.

(b) It is equally clear that the distribution procedure was not strictly adhered to. However, the Appellant has been in his post for several years and some remedial action could have been taken during that time to see to it that he learnt the proper procedure and applied it.

(c) The Appellant's records of service indicate a progression in his career which would imply that his services were satisfactory all along.

(d) The exceptional situation prevailing in the area is by itself not very conducive to a strict appl_cation of the rule book in view of the disruptions it causes and the necessity to meet basic requirements of a population in times of emergency.

(e) The Appellant is the sole breadwinner of a very large family (11 children all of them of school age). The decision to terminate his services seems to the Board to be too severe especially in the absence of any previous warning.

7. In view of the above, the Board is of the opinion that a less drastic disciplinary measure would have been preferable, especially in view of the severe hardship the decision to terminate his services will no doubt cause.

8. Therefore, the Board would like to recommend to the Commissioner General that the Appellant be reinstated in a different position where he could still usefully serve the interests of the Agency."

On 12 July 1990, the Commissioner General transmitted to the Applicant a copy of the Board's report and informed him as follows:

"... The Board has not found that the Agency's decision to terminate your services was motivated by prejudice or other extraneous factors; nevertheless, the Board has recommended that I reconsider the earlier decision with a view to applying a different disciplinary measure.

I have carefully reviewed your case once again, but regret I do not consider it appropriate to vary the decision to terminate your services with the Agency."

In letters dated 31 July and 24 August 1990, the Applicant appealed to the Special Panel of Adjudicators, pursuant to area staff regulation 11.2 and area staff rule 111.4 then in force, against the Commissioner General's decision of 12 July 1990, to confirm the termination of the Applicant's service.

The Special Panel of Adjudicators rendered a judgement on 17 May 1991. Its considerations and decision read, in part, as follows:

> "7. ...the irregularities in the distribution of UNRWA food to persons in need on the West Bank were so serious and extensive that the decision to dismiss the Applicant's appeal must be upheld, despite the difficulties in organizing and keeping satisfactory account of food distribution under the prevailing circumstances. As Distribution Team Leader the Applicant has to be held responsible for these irregularities.
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> 8. The Panel of Adjudicators has given due consideration to the satisfactory service of the Applicant to UNRWA for twenty years and to his numerous family, but considers all the same that the irregularities in food distribution under his supervision were of such gravity as to justify this stern sanction.
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> 9. The Panel deems redundant the finding of the JAB on lack of adequate warning. The two checks subsequent to the first audit show no effort on the part of the Applicant to stop the irregularities.
>
> Decision
>
> 10. For these reasons the Panel of Adjudicators uphold the decision of the Commissioner-General to terminate the Applicant's appointment in the interests of the Agency under Area Staff Regulation 9.1 with effect from 11 November 1989."

On 3 June 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision by the Commissioner-General was motivated by improper motives.

2. The Commissioner-General's decision to terminate the Applicant's appointment was premised on the findings of a Board of Inquiry, which was biased against the Applicant.

3. The Commissioner-General's decision should be reversed on the basis of humanitarian concerns, namely that the Applicant has a number of children in need of support.

Whereas the Respondent's principal contentions are:

1. The Area Staff Regulations and Rules governing the Applicant's appointment at the time of its termination did not assign jurisdiction to the United Nations Administrative Tribunal, which is therefore without competence ratione materiae to entertain the present application.

2. The United Nations Administrative Tribunal is without competence ratione temporis to hear applications from UNRWA Area staff members when the cause of action arose before 14 June 1991.

3. The Agency's termination action was taken, pursuant to the report of a Board of Inquiry, which resulted from an audit. This report explains in detail the serious irregularities in the distribution of commodities under the Applicant's charge.

4. The Applicant's appointment was terminated, pursuant to the Commissioner-General's power to terminate appointments in the interest of the Agency, under area staff regulation 9.1.

5. The report of the Board of Inquiry establishes numerous discrepancies in the accounting of commodities under the supervision and control of the Applicant as Team Leader.

The Tribunal, having deliberated from 2 to 17 November 1993, now pronounces the following judgement:

I. The Respondent's first legal argument is that, at the time of the termination of the Applicant's service with UNRWA, the Area

Staff Regulations and Rules did not assign jurisdiction to the United Nations Administrative Tribunal, which is, therefore, without competence to entertain the present application.

The argument is based, first of all, on the fact that the Applicant was an area staff member and, therefore, subject to the Area Staff Regulations and Rules. These Regulations and Rules were amended on 14 June 1991, to give staff members a broader range of remedies in respect of administrative disciplinary decisions taken by the Agency. As the Applicant's appointment was terminated on 11 November 1989, he comes under the scope of the Rules and Regulations that obtained prior to that date.

II. The Applicant initially made an unsuccessful bid to the Agency to have his termination reviewed. He then appealed to the Joint Appeals Board (JAB) which made recommendations in May 1990. As the Commissioner-General of UNRWA did not accept them, the Applicant appealed to the Special Panel of Adjudicators. After various submissions from both sides, the Special Panel found in favour of the Commissioner-General, on 17 May 1991.

III. In his legal argument, the Respondent sets out the background to this case. He records that UNRWA is a subsidiary body of the General Assembly, established under General Assembly resolution 302(iv) of 8 December 1949, to deal with a specific emergency situation. Because the Agency was of a temporary nature, the General Assembly granted the Commissioner-General of UNRWA broad powers to deal with all aspects of its work, including the recruitment and management of staff. Thus, under paragraph 9(b) of General Assembly resolution 302(iv), the Commissioner-General was authorized to "select and appoint his staff in accordance with general arrangements made in agreement with the Secretary-General, including such of the Staff Regulations and Rules of the United Nations as the Commissioner-General and the Secretary-General shall agree are applicable."

IV. According to the Respondent, a very limited number (about 175) of the approximately 19,000 UNRWA staff belongs to the category of international staff, governed by a set of Staff Regulations and Rules known as the International Staff Regulations and Rules. This category has always had access to the Administrative Tribunal. The balance of the UNRWA staff is governed by the Area Staff Regulations and Rules. Prior to the amendment of 14 June 1991, chapter XI of the Area Staff Regulations provided for recourse procedures. Under these procedures, the Commissioner-General is to establish a JAB with staff participation to advise him in case of any appeal by a staff member against an administrative decision to terminate him/her, in respect of which he/she alleges the non-observance of his/her terms of appointment, including all pertinent Regulations and Rules, or against disciplinary action under regulation 10.3. This regulation goes on to provide for the composition of the JAB. Finally, the regulation provides that any unanimous recommendation by the JAB which is accepted by the Commissioner-General, shall bar the staff member in the case concerned from any further appeal to a special panel of adjudicators.

V. Regulation 11.2(A) provides for such a panel of adjudicators. Its members are to be of high professional and international standing. Staff members may, in certain circumstances, make application against an administrative decision or disciplinary action. Regulation 11.1(B) provides that judgements of the Special Panel of Adjudicators shall be final and without appeal. The amendment already referred to provides for a hearing by the Administrative Tribunal on applications from staff members alleging non-observance of their terms of appointment.

VI. The Respondent contends that the Commissioner-General established a Special Panel of Adjudicators of high standing. He says that, as an area staff member, the Applicant was governed, at the time of his separation, by a special set of Staff Regulations and Rules, authorized by the General Assembly, providing special

organs to resolve disputes. No reference was made in these regulations and rules, which are the only ones governing the Applicant's appointment, to the Administrative Tribunal. The Respondent refers to Judgement No. 70, Radicopoulos vs. UNRWA, which, he says, recognized that the right to make applications to the Tribunal can be denied in certain cases.

The Respondent says that the Applicant exercised his right to appeal to both appellate bodies. The Respondent's contention, therefore, is that the Administrative Tribunal has no competence ratione materiae to review the substance of the administrative decision to terminate the Applicant's services, or to exercise appellate powers over bodies that did have competence in respect of the Applicant and exercised their jurisdiction.

VII. The Respondent makes the further point that the Administrative Tribunal is without competence ratione temporis to hear applications from UNRWA Area staff members when the cause of action arose before 14 June 1991. The Respondent argues that the amendment of 14 June 1991, should have a prospective and not a retrospective effect. He also makes the practical point that there are reasons of policy for ensuring that all administrative decisions taken by the Agency before 14 June 1991, are not automatically open to review. There would be serious administrative problems and there would be practical difficulties, such as possible unavailability of witnesses and records. Such a state of instability would be against the interests of justice. Finally, the Respondent claims that the case is res judicata.

In considering the legal arguments of the Respondent, the Tribunal accepts that, as the termination occurred before 14 June 1991, the case must be considered in the light of the rules as they were prior to that date.

VIII. The Tribunal, in dealing with the Respondent's contention that it is without competence ratione materiae to entertain the application, must take cognizance of its own previous approach in

this area. The Tribunal considers that the Respondent's reference to Radicopoulos is selective. In that case, while indicating that no mandatory provisions instituting another procedure had been laid down at the relevant time, the Tribunal considered itself competent to deal with an application on the basis of the agreement, pursuant to General Assembly resolution 302(iv). Again, in the earlier 1955 case of Hilpern, the Tribunal rejected the Respondent's contention that "the Tribunal is competent to hear applications from staff members of the United Nations Secretariat only". The Tribunal refers to these early cases merely to indicate that it was of the view that it was not precluded from hearing cases involving staff members such as the Applicant, there being the lack of a judicial forum for dealing with such cases.

IX. In the more recent case of Zafari (Judgement No. 461), the Tribunal made reference to the following opinion of the International Court of Justice of 13 July 1954 "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them (Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954; I.C.J., Reports 1954, p. 57)."

X. The Tribunal has, in previous cases, referred to considerations of the International Court of Justice concerning the extent of the competence conferred on the ILOAT, because the Tribunal deemed that such considerations were equally valid for UNAT. The relevant passage, from judgements of the Administrative Tribunal of the ILO in cases brought against the United Nations Educational, Scientific and Cultural Organization (ICJ, Reports of Judgements, Advisory Opinions and Orders, 1956, p.97) is as follows: "However, the question submitted to the Tribunal was not a dispute

between States, It was a controversy between UNESCO and one of its officials. The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization."

The Tribunal therefore has consistently held the view that it is competent to entertain cases, such as this one, where the primary concern is the absence of any judicial procedure established by the Area Staff Regulations and Rules for the settlement of disputes submitted to JAB.

XI. The central point of the Respondent's case is that the Applicant's case was heard by both bodies set up for the purpose under the relevant Regulations and Rules. The bodies to which the Applicant had recourse were both internal bodies as indicated by the method of appointment of their members. The Applicant should have had available to him, in fairness and equity, an external judicial body to which he could have appealed. Indeed, the fact that the international staff members of UNRWA had such recourse, shows even more starkly the bias which existed against the Applicant and his class of staff members. Why should not all staff have similar protection? The Tribunal, therefore, rejects the Respondent's first argument.

XII. The Respondent's second argument is that the Tribunal is without competence ratione temporis. This argument need not now be dealt with, in view of the Tribunal's considering the case on the basis of rules existing prior to 14 June 1991.

Again, as a result of its finding on the first argument, the Tribunal need not pursue the Respondent's third legal contention that the matter is res judicata. The Tribunal merely observes that if any argument exists to support the Respondent's view that the matter is res judicata, it must be superseded by the Applicant's

entitlement to a hearing by the Tribunal. Finally, the Tribunal cannot sustain the argument based on reasons of policy or on the administrative problems and practical difficulties which would otherwise arise, for upholding the Respondent's legal arguments. Any such policy or difficulty cannot be held to negate the principles of equity and justice which must be paramount.

XIII. The Applicant was a Distribution Team Leader in the Jerusalem Area. He was responsible for supervising the distribution of food to refugees in his service area, for keeping records and for accounting for all such food supplies in accordance with the Agency's Regulations.

There was suspicion of pilfering in the Applicant's Area which resulted in an Audit of the Supply, Distribution and Warehousing Operations in the West Bank Field, between 16 May and 15 June 1989. Two surprise visits to the stores in which the Applicant was the Distribution Team Leader, resulted, according to the Respondent, in the discovery by the Auditor, of irregularities. These irregularities included the Applicant's excessive loading of commodities on trucks for daily distribution for which the Applicant is said not to have provided a plausible explanation. During the second visit, the Applicant's son is alleged to have forcibly prevented the auditor from examining certain supplies.

XIV. Because of these happenings, a Board of Inquiry was set up. This Board heard the Applicant on three occasions and interviewed 18 witnesses. The Board also had at its disposal a report of a study undertaken by the Field Relief Department, which the Respondent says, found substantial discrepancies, over a short period, between the Applicant's records and the corresponding stock available. The Board found that the Applicant's Distribution Team failed to follow Agency rules and guidelines regulating the storage and distribution of commodities. It also found that commodities had been misappropriated. The Internal Audit indicated a lack of respect for procedure and the auditors' suspicions were aroused.

The Board of Inquiry concerned itself with discrepancies in the distribution of basic commodities and irregularities in the distribution of rations to nursing and pregnant women, based on a study undertaken by the Relief Department.

The study, in relation to distributions carried out over the period 22-29 July 1989, found substantial discrepancies in the balance of stock remaining after the distributions, between the figures for remaining stock quoted in the records of the Team Leader and the Head Storekeeper, and the actual figures for returned stock. It seems that the Head Storekeeper and the Team Leader could not account for such discrepancies.

XV. It appears that the Board of Inquiry also found departures from established Agency practices i.e. returned commodities were placed in the Team Leader's own distribution store (a store he was permitted to operate adjacent to the main warehouse) rather than the main warehouse; no load note accompanied the returned commodities back to the distribution store; the Team Leader used to issue a load note to himself to cover the goods and the note was not signed by the driver; there was departure from Agency practice in the entries in the books regarding goods returned (although this appears to have involved the Head Storekeeper to a greater extent than the Team Leader); substantial discrepancies were found in the Team Leader's distribution book - the Team Leader could not explain these discrepancies. There was evidence from a daily-paid labourer of covert activities involving the Team Leader receiving money from truck drivers. On one occasion, he saw a trucker and his son loading bags of flour from the distribution store into his private vehicle about an hour after the distribution was closed. This was done in the Team Leader's presence. There was a further incident, described by this labourer, of his being ordered by the Team Leader to hand over rations to a flour distributor, the Team Leader saying that no ration cards had been produced. Following this, the labourer was told by the Team Leader to take any oil or flour that he wanted. This was interpreted by the labourer as a bribe. The

Board says that they found the labourer, Mr. Toumaley, totally credible, although the incident was denied by both the Team Leader and the distributor. There was further information from an anonymous source which the Board of Inquiry presumably took into account, but which must be regarded as of no value as it was anonymous.

XVI. The Board report also refers to excess commodities in the truck which the Team Leader said were for distribution to nursing and pregnant women. This was discovered in the course of the Audit. However, the Board discovered that up to 40% of the ration card numbers recorded on the distribution list, belonged to persons who were dead, absent from the West Bank or who were not in possession of valid cards claiming relief as nursing or expectant mothers. There were many changes in the coupons taken from the clinic. A check of ration cards of nursing and pregnant women revealed many cases in which registration numbers had been changed, dates had been altered and the registration office stamp did not appear on the coupons. A proportion of every distribution list had been completed by the Team Leader. There were explanations, which were unconvincing, in the view of the Board, for the practice of the Team Leader's completing the list.

The Board also concluded that there had been manipulation of the flour scale, rather than its being faulty, as the Team Leader claimed.

The Board finally concluded that there were large discrepancies in the distribution of each of the commodities for which the Team Leader could not give any credible explanation. The Board's finding was that the entire team was involved in the intentional misappropriation of commodities and therefore, guilty of serious misconduct.

XVII. The Applicant's case is based on many different points. Only some of the most important need to be mentioned. The Applicant says that he was following the example of his predecessors; that all

responsible officials who came from UNRWA, either from Vienna or from the West and East Banks, saw the system and the Applicant was never asked to change it; that he believed his method of work was the correct one; that he did his utmost in difficult circumstances; that he was living and working in difficult political circumstances; that he did everything in conformity with regulations; that the enquiry into the figures resulted in mistaken findings; that while the Applicant worked for many years in Distribution, the Inspectors said that the distribution process was satisfactory; that the supervisors saw the procedure that he followed and, indeed, his system was the same as that in Nablus and Hebron. He makes reference to the keys of the stores being in his possession and that the area officer knew this; he says that, because of the many distribution teams in the area, merchants throughout the areas used to buy commodities from the refugees and sell them in the towns and villages in the West Bank; he paints a picture of many refugees as being too busy or ill or old to queue so they gave the merchants their ration cards. He says that his children were not working in the Centre, they were there only because the schools were closed; his description of what can be described as "the Biddo incident" is one in which his physical courage is supposed to have saved the situation rather than the Board's interpretation of refugees angry and impatient with the conduct of the distribution process, which the refugees regarded as corrupt.

The Applicant also makes a more personal plea, pointing out that he supports a large family, referring to the high cost of living and to political difficulties in the area in which he resides. He says that his dismissal destroyed his whole family.

XVIII. The Tribunal is of the view that the only reasonable conclusion on the evidence is that the Applicant was involved in dishonest practices in accordance with the findings of the Board of Inquiry and the Audit. The Tribunal has reached this conclusion on the basis of the findings which resulted from the examination of the

relevant books and documents, rather than from any verbal evidence which was given.

The Applicant was accorded reasonable opportunities of answering the charges and he was unable to do so. That part of his defence based on the proposition that the system was known to those in positions of higher authority, cannot be accepted by the Tribunal. His system of work could have been known only with the sort of inquiry that was in fact carried out. Equally, the Tribunal has to reject as unsustainable the Applicant's submission that he believed his method of work was the correct one. There is no possible basis on which he could reasonably have thought this to be so. Again, while the Tribunal sympathizes with the Applicant's difficult work and living conditions, this cannot, in any way, explain or excuse the Applicant's dishonest way of working, irrespective of his claim that he had worked satisfactorily in the distribution process for many years.

XIX. The Tribunal therefore rejects the Applicant's appeal.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 17 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary